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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

Nos. 510 to 520

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

Petitioner,

versus

FIREMAN'S FUND INSURANCE COMPANY, (of San Francisco, California),

Respondent.

—— and ——

THE TEN FOLLOWING CONSOLIDATED CASES TRIED ON THE ONE RECORD, WITH THE ONE DECISION TO DISPOSE OF ALL:

Globe & Rutgers Fire Insurance Co. of New York;
Norwestern F. & M. Ins. Co., of Minneapolis, Minn.;
Hartford Fire Insurance Co. of America, of New York;
National Liberty Ins. Co. of America, of New York;
Aetna Insurance Company of Hartford, Connecticut;
Western Assurance Company of Toronto, Canada;
Liverpool & London & Globe Ins. Co., of London, Eng.;
Springfield F. & M. Ins. Co. of Springfield, Mass.;
Franklin Insurance Company of Philadelphia;
Phoenix Insurance Company of Hartford, Conn.,

ALSO RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI

To the Circuit Court of Appeals, Fifth Circuit, Reversing United States District Court, Eastern District of Louisiana, and

BRIEF IN SUPPORT OF PETITION FOR WRIT.

JOHN D., M. A., & EDWIN H. GRACE,
Attorneys for Petitioner.

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FOREWORD.

The Circuit Court of Appeals for the Fifth Circuit is in direct conflict with the Second and Third Circuits and other authorities, in respect to the determinaton as a matter of law and just application of the terms "seaworthy" and "perils of the sea," as set out in the policies of marine insurance; holding in this case, concerning a small wooden inland-water vessel which was prepared for a special sea voyage under recommendations of underwriters' own marine surveyors, designated in policies of insurance for that purpose, and that vessel thereafter approved by them for such voyage; that when said vessel encountered on the gulf, the second day out, such weather and choppy sea conditions, with waves running from four to five feet high, sufficient to cause her to roll and pitch and pound in the seas continuously for at least three and a half hours, or more, opening up the seams in her wooden hull and causing her ultimate total loss, that notwithstanding those conditions and the underwriters' complete knowledge of the vessel, her type, size and construction, insuring her as such and exacting an extraordinary high premium therefor amounting to from more than six times to more than eight times the ordinary rate for ordinary seagoing vessels, holds that this loss was not a loss by a peril of the sea within the terms of insurance policies, because she could not withstand those waves which were deemed moderate to the big three thousand ton iron steamship, which had this little wooden vessel in tow, even though the master of that steamship testified that while the weather conditions were moderate for his big steamship it was heavy weather for the tug. But the Circuit Court of Appeals guided by their conclusion that what are perils of the sea cannot be determined by

what is an extraordinary, irresistible, overpowering condition of the sea with respect to the particular size and type of the vessel, whatever the size of the waves or force of the wind may be, and therein it is in conflict with other Circuits and contrary to English cases and leading English and American writers of the law of insurance, as shown herein below.

U. S. C. C. A., Fifth Circuit:	*U. S. C. C. A., Third Circuit:*
Decision rendered herein, reversing District Court:	*2 Fed. (2d), 137*, affirming District Court:
" * * * we are of opinion that the phrase 'perils of the sea' does not vary in meaning according to the size and type of vessel."	"Perils of the sea against which it was insured, were such perils as would be extraordinary to a boat of its type."
And reversed the District Court, which had followed the Third Circuit.	Affirmed the District Court.

U. S. C. C. A., Second Circuit:

126 Fed., 111, affirming *162 F., 379*, cites with approval *Thebaud v. Great Western Ins. Co., 155 N. Y., 516*, as setting out the "rule," wherein it is said:

> " * * * the real question presented to the defendant, when the application for insurance was made, was whether this boat, *as she was known to both parties to be*, could make the transit from the port of departure to her destination. * * * "

In *Turnbull v. Janson, 36 L. Ed., 635; 3 Asp. M. C. 433—C. A.*, before James, Baggallay, Bramwell and Brett, L. JJ.

> "Brett, L. J.: If a ship of twenty-four tons is insured for a voyage from Liverpool to New York, she cannot be made seaworthy in the same degree as a ship of four hundred tons sailing on the same voyage would be, but she must be made as seaworthy for the voyage as a ship of twenty-four tons can be made. * * *"

Arnould on the Law of Marine Insurance, 10 Ed., Sec. 710, p. 920, Vol. 2, says:

> "* * * Thus, if a steamer built for river navigation is to be sailed from this country to Calcutta or to Odessa, and the underwriter accept the risk with full information as to the class of vessel and the intended voyage, the assured is only required to make her as seaworthy for the voyage as is reasonably practicable with such a vessel by ordinary available means."

Joyce on the Law of Insurance, Vol. 4, § 2159, p. 3687 (with citations of cases) says:

> "§ 2159. * * * If a vessel is built for river service and not for open sea navigation and is insured for a voyage to a place where it is intended to be used and said voyage necessitates navigating the open sea for at least a part thereof, a recovery for the loss of the vessel shortly after putting to sea,

> cannot be defeated on the ground of an implied warranty of seaworthiness for the sea voyage where assurer, before assuming the risk is put in possession of all information concerning the construction and character of the vessel, the plans and specifications thereof and has knowledge through its engineer of the extent of the hazard and accordingly exacts double the ordinary premium charged for sea going vessels, so that the nature of the service for which she was intended is fully known to both parties."

The eleven cases concerned herein stand for trial on the one record and involve the due construction of insurance policies issued in London, England, Toronto, Canada, and in various States of the Union. Their grave importance to our maritime commerce brings forcibly to the front what this Honorable Court said in *Peters v. Warren Insurance Co., 14 Pet., 99-108, 10 L. Ed., 371*, to-wit:

> "If there be any commercial contract which more than any other requires the application of sound common sense and practical reasoning in the exposition of it, and in the uniformity of the application of rules to it, it is certainly a policy of insurance, for it deals with the business of common men who are unused to deal with abstracts of refined distinctions."

The foregoing is doubly true with respect to the direct conflict which exists between Circuit Courts of Appeals shown above.

IN THE

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OCTOBER TERM, 1926.

No.

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

Petitioner,

versus

FIREMAN'S FUND INSURANCE COMPANY, (of San Francisco, California),

Respondent.

—— and ——

THE TEN FOLLOWING CONSOLIDATED CASES TRIED ON THE ONE RECORD, WITH THE ONE DECISION TO DISPOSE OF ALL:

Globe & Rutgers Fire Insurance Co. of New York;
Norwestern F. & M. Ins. Co., of Minneapolis, Minn.;
Hartford Fire Insurance Co. of America, of New York;
National Liberty Ins. Co. of America, of New York;
Aetna Insurance Company of Hartford, Connecticut;
Western Assurance Company of Toronto, Canada;
Liverpool & London & Globe Ins. Co., of London, Eng.;
Springfield F. & M. Ins. Co. of Springfield, Mass.;
Franklin Insurance Company of Philadelphia;
Phoenix Insurance Company of Hartford, Conn.,

ALSO RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI

To the Circuit Court of Appeals, Fifth Circuit, Reversing United States District Court, Eastern District of Louisiana.

To the Honorables, the Justices of the Supreme Court of the United States:

The petition of the Compania de Navegacion, Interior, S. A., whereof Clyde A. Barbour is President, for a writ of *certiorari*, requiring the United States Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court of the United States for its review and determination, the case of the *Fireman's Fund Insurance Company, appellants* (respondents in the lower Court and here), *versus The Compania de Navegacion, Interior, S. A., appellee* (libelant in the lower Court, petitioner here), numbered 4926 of the docket of said Court (consolidated with ten other causes, all brought by petitioner against eleven insurance companies, foreign and domestic, on policies of marine insurance, all covering the total loss of petitioner's tug "Wash Gray" and all determined under agreement between party litigants upon the one record).

RESPECTFULLY SUBMITS:

First: The Circuit Court of Appeals for the Fifth Circuit in reversing the District Court herein is squarely and directly in marked conflict with the Circuit Courts of Appeals for the Third and Second Circuits, *The Tornado, Vol. 1, p. 197, A. M. C., 1925, sub. nom, Klein v. Globe & Rutgers Fire Ins. Co., 2 Fed. (2d), 137, 3rd C. C. A.*, affirming the District Court for the Western District of Pennsylvania; and *Farmers Feed Co. v. Insurance Co. of North America, 166 Fed., 111, C. C. A., 2nd Circuit*, affirming the District Court for the Southern District of New York, *162 Fed., 379*, as well, also, against leading cases of State Courts

of last resort and leading American and English authors; in its interpretation of the meaning at law and rightful application of the terms "perils of the sea," and "seaworthy," terms of the very greatest import in the law of marine insurance, seriously affecting our internal, coastwise and foreign commerce, as will be presently shown.

Second: The policies sued on herein cover a small wooden inland-water vessel, built in the United States, of one hundred and five tons according to United States rule (217 gross tons according to Mexican rule) eighty-seven and a half feet long, nineteen feet beam, with nine feet depth of hold; well known to the underwriters before their policies issued, covering a voyage from a gulf port in Mexico to a gulf port in the United States, while in tow of the steamship "Freeport Sulphur No. 1" of about three thousand tons, specially designated by the underwriters to do the towing (Tr., 17). Before entering upon this voyage two expert marine surveyors were designated and required by the underwriters to survey said vessel; they did so, and after all their recommendations were carried out to their complete satisfaction the said underwriters' surveyors approved said vessel as fit and seaworthy for the said voyage (Tr., 75, 76, 176, 177), and, wherein, because of the greater degree of sea perils to which such an inland-water vessel of her size and type and construction might be exposed, as compared with an ordinary sea-going vessel, the underwriters herein, respondents, showing their full appreciation thereof charged premiums varying in amount among them, from more than six times to more than eight times the premium ordinarily charged on ordinary sea-going

vessels, to meet the relative degree of danger from sea perils, or, as the policies put it, "perils of the sea."

Third: The District Judge, in referring to what the two expert marine surveyors to the underwriters did, who were designated by the underwriters for this particular service and whose reports were delivered to respondents before the policies issued (Billin, an underwriter, Tr., 491), reports which not only stand without contradiction but are not by even one word questioned or critisized by any witness, says, in his opinion, at Tr., 620:

> "Because of the 'Wash Gray's' size, type and open sea voyage intended, the insurance risk was unusual, and therefore, when application was made, for insurance, the underwriters required an inspection for seaworthiness, general fitness and towing arrangements for that voyage. For the purpose two marine surveyors, representing various underwriters, made a thorough, critical inspection, following by recommendations for certain overhauling, particularly of her towing-bitts and decking, for the planking up of doors, ports, windows and other openings, for her pumps and also for her complement of men. They formally reported to the underwriters that these requirements had been complied with, certified her seaworthiness, and particularly her fitness for the particular voyage contemplated. Further, because of the extra hazardous risk involved in the transit of this small inland-vessel in tow at sea, the

> premiums were rated up considerably by the underwriters. These varied, in the different policies, between one and one-half to two and one-eighth per cent."

And the Circuit Court of Appeals, speaking of a time when the "Wash Gray" had covered the greater part of her sea voyage without anything of moment occurring, and referring to the second night out, when the wind had acquired such velocity to set up a choppy sea, with waves running from four to five feet high, a condition of wind and sea, such as it was, was of sufficient force and volume to become and did become irresistible and overpowering to her, and would be to any other vessel of her type, size and construction; which wrought her total destruction, the Appellate Court saying (Tr., 648):

> " * * * we accept the trial court's finding of fact that the loss was caused by the condition of weather and sea."

The Appellate Court still further says, speaking of that condition of the sea (Tr., 646-647):

> "By eight o'clock that night a moderate northeast breeze was blowing against the current, and as a consequence the sea became choppy. A speed of nine miles an hour had been maintained from the beginning of the voyage, and the strong current increased that rate of speed through the water in the choppy sea to 10½ miles an hour. As soon as the 'Wash Gray' encountered the choppy sea, she began to roll and pitch but she gave

> no signal of distress until 11:30 p. m., or 3½ hours later. In the meantime the speed was not slacked, and the rolling and pitching continued. At 10 P. M. it was discovered that the towing bitts of the 'Wash Gray' were working loose, and that she had shipped considerable water. An attempt was made to pull the bitts back in place by a Spanish windlass, but by 11:30 p. m. enough seawater had entered through her seams to force her down by the head; and then a signal of distress was given, and the hawser was cut. The 'Freeport Sulphur No. 1,' came alongside and remained until daylight, and then, after unsuccessful efforts to pump the water out, proceeded to tow at slow speed until 11:12 on the morning of the 8th at which time the tug sank and became a total loss."

The District Court, among other facts, which, too, stand without contradiction, in noting the efforts made by the crew of the "Wash Gray" to save that vessel, says that her pumps,

> "both in hand and steam were worked full power and time in an effort to discharge the water pouring in her open seams." (Tr., 609.)

Speaking of the sea and weather effect upon the little 105-ton wooden inland-water water tug, as compared to the 3000-ton big iron steamship "Freeport Sulphur No. 1," the master of that vessel, a witness produced by respondents, testifying to towing the wooden

inland-water tug, "Wash Gray," says, without contradiction whatsoever (Tr., 53):

> "However, what is a light and moderate swell aboard a three thousand ton ship could be considered as heavy weather aboard an eighty foot tug boat, being towed at the rate of nine miles per hour."

Respondents' own witness, said master of many years' experience, testfies again without contradiction (Tr., 427) that where even a wooden ship—without distinction as to her size—rolls or pitches in the sea (and such the "Wash Gray" did for several hours, as found by the Circuit Court of Appeals in the above quotation, based on uncontradicted evidence), "it has a straining effect on a wooden ship and, of course, the seams will open;" and, further (Tr., 423), that a choppy sea is hard on a small boat.

The Court will note, too, that with a head wind which was blowing from a northerly direction, at a velocity of approximately twenty-five miles an hour (Tr., 409) and the tug "Wash Gray" being towed from a southerly direction against that wind at a speed of approximately nine miles an hour, that the combined meeting movements of wind and vessel gave a wind force against the vessel of approximately thirty-five miles an hour, a wind force rated by the weather bureau scale as a moderate gale. Then, too, the four to five foot choppy seas presented such a condition to this little tug with a mean draft of approximately seven and a half feet easily comparable to a big steamship of a mean draft of thirty feet, pitching and rolling into

monstrous cross waves of a height equal to twenty feet. In each instance both vessels would be contending for their existence against waves of two-thirds their respective mean draft, threatening to encompass their absolute destruction, just as they did to the "Wash Gray"—a peril of the sea, a peril insured against.

Fourth: Respecting the actual cause of the loss of this vessel the Appellate Court says (Tr., 648):

> " * * * we accept the trial court's finding of fact that the loss was caused by the condition of the weather and sea,"

and the District Judge, in commenting upon that same condition of weather and sea, following the Third and Second Circuits in his conclusions (Tr., [redacted]): 608

> "This, for a vessel of its size and type, was an extraordinary condition, amounting under the circumstances, to such perils of the sea as the contract contemplated."

The trial Court herein, in the instant cases following the Circuit Court of Appeals for the Third Circuit, in *The Tornado, A. M. C. 1925, p. 197, Vol. 1 (2 Fed. [2d], 137)*, says, in respect to the comprehensive meaning, in law, of the term "perils of the sea" (Tr., 607):

> "Taking up the contentions made as stated, the first makes direct issue with the libelant's contention as to the meaning of the term peril of the sea. Upon this point I am fully persuaded by the carefully considered opinion in the 'Tornado' case, cited and

> briefly quoted *supra*, and conclude that the implied warranty of the contract was that the 'Wash Gray' was a seaworthy inland-water vessel, and was able to withstand all ordinary perils upon such waters, and the perils of the sea against which it was insured were such perils as would be extraordinary to a boat of its size and type."

The Circuit Court of Appeals for the Third Circuit, in passing on the above referred to case of the "*Tornado*" (followed by the trial Judge in the instant cases) in an opinion appearing in *Vol. 1, p. 197, A. M. C. 1925 (sub nom Klein v. Globe & Rutgers Ins. Co., 2 Fed.* [2], *137)*, concludes:

> "We are in accord with the conclusions of the learned District Judge (Western Dist. Penn.) and adopt his opinion as expressing our views. * * * "

Among other things stated in the "*Tornado*," *supra*, standing as the opinion of the Circuit Court of Appeals for the Third Circuit, it is said:

> "What are the 'perils of the seas' contemplated in the policy? In their excellent and exhaustive brief, counsel for the respondent have undertaken to answer the query by the citation of a number of cases wherein the term is defined. Nearly all, if not all, of those cases had as subject matter policies upon sea going vessels, and while we adopt the underlying principles which led to the definitions, we cannot accept the literal definitions be-

> cause of the variation between the underlying facts of the instant case and those of the cases cited. In arriving at the meaning of the terms in the present policy we must keep in mind the kind of boat insured, the voyage contemplated and the nature of the risk assumed. * * * The implied warranty of the libelant was that the boat was seaworthy to the extent of being able to withstand all ordinary perils of navigation upon the upper river, and *the 'perils of the seas' against which it was insured were such perils as would be extraordinary to a boat of its type.*" (Italics ours.)

The Court of Appeals for the Fifth Circuit, in reversing the trial Judge herein, who had followed the above opinion, does, in commenting upon that opinion, which prevails in the Circuit Court of Appeals for the Third Circuit, with which the Fifth Circuit has placed itself directly in conflict, says (Tr., 650):

> "The case of Klein v. Globe & Rutgers Insurance Company (the 'Tornado,' C. C. A., 3rd Cir., 2 Fed. [2], 137) relied on by the District Judge in his opinion, and by the appellee here, *seems to sustain the position that what constitutes a peril of the sea is to be determined by the size or type of the insured vessel.* (Italics ours.) Unless that case is distinguishable from this one by a difference in the risks insured against, by the probability that the loss of the vessel there insured was caused by striking a log in the river, or

> by a fact that the language relied on was used in connection with the extent of the implied warranty of seaworthiness, *then, that case does sustain the decree of the District Court.*" (Italics ours.)

However, notwithstanding what is said by the Circuit Court of Appeals for the Third Circuit, respecting the type of vessel insured, the Circuit Court of Appeals for the Fifth Circuit places itself in these instant cases, squarely in conflict therewith, saying:

> "* * * we are of opinion that the phrase 'perils of the sea' *does not vary in meaning according to the size or type of vessel.* (Italics ours.) The owner of a vessel impliedly warrants its seaworthiness. Any vessel, whatever its size or type, to be seaworthy, must be able to withstand the ordinary perils of a voyage at sea, Arnould, 686. A vessel is unseaworthy that does not measure up to this minimum requirement."

But an examination of *Arnould on Marine Insurance*, cited by the United States Circuit Court of Appeals for the Fifth Circuit, where that author is dealing with inland-water vessels required to perform a voyage on the high seas, that authority, with its citation of leading English cases, most conclusively shows that it does not support the contention set up by that Court; on the contrary, it is not only squarely, unequivocally, directly in conflict with that Court, but most clearly bears out the Circuit Court of Appeals for the Third Circuit. Here is what can be found in *Section*

696 of Arnould on Marine Insurance, 10th Edition, p. 902, with citation of leading English cases:

> "§696 * * * There is no fixed standard of seaworthiness; the degrees of seaworthiness required depends on the nature of the adventure (citation of authorities.) Therefore, for the purpose of determining the extent of the warranty, evidence can be given that a ship insured for a certain voyage was from her construction not capable of being made as fit to encounter the perils of the voyage as any ordinary vessel; and in such a case the utmost that the warranty requires is that the particular ship shall be made as fit for the voyage as is practicable."
>
> (Authorities are cited in foot note together with special reference to §710 of this work for further discussion of this topic.)

Turning to §*710 (Arnould on Marine Insurance, 10th Ed., 919-920)*, cited in the foot note to the above §696, we find the first paragraph deals with ocean going vessels; the second paragraph deals with inland-water vessels having insurance coverage for an outside or sea voyage, as follows:

> "§710. It is obvious that there can be no fixed and positive standard of seaworthiness, but that it must vary with the varying exigencies of mercantile enterprise. 'The ship,' said Lord Cairns, 'should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way,

may be fairly expected to encounter' on the voyage (citation of authorities). * * *

"*Again, the class of vessel may be such as will not admit of being put into that condition of seaworthiness requisite in ordinary cases for the contemplated voyage.* (Italics ours.) The effect of this is not to dispense with the implied warranty of seaworthiness, but to accommodate the warranty to what is reasonably practicable in the particular case. But the underwriter must be informed of the peculiar nature of the risk. (p) Thus, if a steamer built for river navigation is to be sailed from this country to Calcutta or to Odessa, and the underwriter accept the risk with full information as to the class of vessel and the intended voyage, *the assured is only required to make her as seaworthy for the voyage as is reasonably practicable with such a vessel by ordinary available means* (italics ours). But he is bound to that much (r); and even such a description of the subject of insurance in the 'slip,' as that it is an 'abandoned ship' does not dispense with this warranty and the assured's obligation under it (s). Whether in fact the vessel was in such a condition as satisfies this warranty in the particular case is a question for the jury (t)."

Joyce on the Law of Insurance, Vol. 4, §2159, p. 3687, and citations, is, also, directly at variance with the Circuit Court of Appeals for the Fifth Circuit.

Fifth: The Circuit Court of Appeals for the Fifth Circuit has, also, placed itself directly in conflict, not only with the Court of Appeals for the Third Circuit *(supra)*, but so, also, with the Circuit Court of Appeals for the Second Circuit, wherein, in the *Farmers' Feed Company v. Insurance Company of North America, 166 Fed., 111* (affirming the District Court for the So. D., N. Y., *162 Fed., 379)*, the Circuit Court of Appeals for the Second Circuit said:

> "It is not pretended that any fraud or misrepresentation was practiced upon the Insurance Company in order to secure the policy. The Mackey was undoubtedly very old and somewhat decayed, but her condition, her history, and all the facts regarding her were fully known to the company at the time the policy was executed, a written record stating all the particulars being on file with the company. The underwriters knew that she was not a desirable risk, they knew that they were taking more than the ordinary hazard and they guarded themselves against it by charging more than the ordinary premium. * * * "
>
> "We concur with the District Judge in thinking that when the respondent 'knowingly took the risk, at a high premium, it should be held to its bargain and not be permitted to resort to the terms of the policy to overcome the claim.' The facts bring the case within the rule of Thebaud v. Great Western Insurance Co., 155 N. Y., 516, 50 N. E., 284, and cases cited."

The District Court in the above case (So. D., N. Y., *162 Fed., 379)* quoted at length from *Thebaud v. Insurance Co. (supra)*, and the Circuit Court of Appeals, 2nd Circuit, referred to this case as evidencing the rule, as above shown, and from that quotation the following is taken:

> "Indeed it is not easy to perceive why an insurance company, by reason of the formal words of clauses (of a general and comprehensive nature), inserted in a policy intended to meet broad classes of contingencies, should ever be allowed to avoid liability on the ground that facts, of which the company had full knowledge at the time of issuing the policy, were then not in accordance with the formal words of the contract, or some of its multifarious conditions. If such facts are to be held a breach of such a clause, they are a breach *eo instanti* of the making of the contract, and are so known to be by the company as well as the insured. And to allow the company to take the premium without taking the risk would be to encourage a fraud.
>
> * * * * *
>
> "But the real question presented to the defendant, when the application for insurance was made, was whether this boat, as she was known by both parties to be, could make the transit from the port of departure to her destination. The defendant concluded to take that risk in consideration of a double premium, and to permit it now, after receiv-

> ing the premium, to defeat a recovery, on the ground that she was not seaworthy in consequence of alleged defects of construction known to it at the time of taking the risk would scarcely be consistent with commercial morality."

Petitioner further represents that the three preceding cases were submitted to the Circuit Court of Appeals for the Fifth Circuit and that Court has placed itself directly in opposition thereto, by, we believe, having overlooked the fact that it was held in each case as in other authorities, that where an underwriter has knowledge of all the facts which go to the seaworthiness of the vessel, and, in the light thereof, issues its policy and accepts the premiums, especially premiums rated up on account of the risks to such a vessel, it cannot then resort to the terms of the policy, *in relation to seaworthiness of the vessel*, which is, under such circumstances waived, and the contract then stands considered effective between the parties in respect to the vessel, as each party knew that vessel. The Circuit Court of Appeals saying, through apparently a misunderstanding of those cases (Tr., 650):

> "Appellee also relies on Farmers' Feed. Co. v. Insurance Co., 162 F., 379, decided by the District Court for the Southern District of New York, and affirmed by the Circuit Court of Appeals, 166 Fed., 111; and on Thebaud v. Great Western Insurance Co., 155 N. Y., 516. Recovery was allowed in each of

> those cases on the actual contract which was held to be different from the contract evidenced by the insurance policy. It was merely held that effect should be given to the actual contract. The facts in this case do not warrant the conclusion that appellant bound itself by its conduct or by any agreement to accept the risk of unseaworthiness."

But what is said by this same Circuit Court of Appeals for the Fifth Circuit in last above sentence, appears rather obscure when considered in connection with what they say on Tr., 649:

> "Appellants made its own examination and survey and thereby waived the implied warranty of seaworthiness."

And the cases criticised *(supra)* by the Circuit Court of Appeals (5th Cir.) held in effect likewise, i. e., that the underwriters having gained such actual knowledge of the vessel insured before that insurance was placed, must be held to have waived the provisions of the policy in respect to seaworthiness; and while in the District Court for the Southern District, New York, the Circuit Court of Appeals for the Second Circuit and the Court of Appeals for the State of New York held the underwriters liable in their contract, saying that to hold otherwise "would be to encourage fraud;" to sanction acts on the part of the underwriters which "would scarcely be consistent with commercial morality," thereupon, the underwriters were held to the knowledge they possessed when concluding

the contract. But the Circuit Court of Appeals for the Fifth Circuit gives no effect whatever to their finding that the underwriters in the instant cases had made their "own examination and survey" of this vessel, and reversing the lower Court, ordered all the libels dismissed.

On petitioner's application for a rehearing there was attached thereto a certified copy of the libel and policy of insurance sued on in the above case of *Farmer's Feed Co. v. Insurance Co., 162 Fed., 379*, affirmed *166 Fed., 111*, and appear in Tr., 679-686.

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* may issue directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding that Court to certify and to send to this Court a full and complete transcript of record of all proceedings of said Court in the above entitled cause to the end that said cause may be reviewed and determined by this Court as provided by law and your petitioner will ever pray.

COMPANIA DE NAVEGACION, INTERIOR, S. A.,

By C. A. BARBOUR,

President.

JOHN D. GRACE,
M. A. GRACE,
EDWIN H. GRACE,
Attorneys for Petitioner.

STATE OF TEXAS,
COUNTY OF HARRIS,
CITY OF HOUSTON.

CLYDE A. BARBOUR, being first duly sworn according to law, deposes and says that he is the President of the Compania de Navegacion, Interior, S. A., the above petitioner, and that he is qualified and has authority to act herein for the foregoing petitioner, that he has read over the foregoing petition and that the statements contained therein are true and correct to the best of his knowledge, information and belief. That Compania de Navegacion, Interior, S. A., is a corporation.

(Sgd.) C. A. BARBOUR.

Sworn to and subscribed before
me, this 27th day of August, 1927.

(Sgd.) EARL T. ZYLICZ,

Notary Public, Harris County, Texas,
My Commission Expires June 1, 1929.

I hereby certify that I have examined the petition in this cause and am familiar with the facts in this case, and that in my opinion the said petition is well founded and that the cause is one in which the prayer of the petition should be granted by this Honorable Court.

JOHN D. GRACE.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No.

THE COMPANIA DE NAVEGACION, INTERIOR, S. A.,

Petitioner,

versus

FIREMAN'S FUND INSURANCE COMPANY, (of San Francisco, California),

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT.

Petitioners desiring to send their inland-water, twin screw tug, "Wash Gray," from Tampico, Mexico, where she had been employed on the Panuco River, to Galveston, Texas, to have a new type of engine installed, made inquiries through their New York brokers to ascertain if underwriters would insure this wooden inland-water vessel for this special voyage, which would in greater part be out on the Gulf, and, if so, upon what terms and conditions. Whereupon, the underwriters separately agreed to write the risk in varying sums, which aggregated eighty-five thousand dollars ($85,000.00), but at a very much higher rate of premium than charged on ordinary sea-going vessels, the underwriters taking into consideration the

character of the vessel and the perils to which she might be exposed (Billin, underwriter, Tr., 491).

Insurance effected was:

> "Against the adventures and perils of the harbors, bays, sounds, seas, rivers, and other waters as above named, and fires, that shall come to the hurt, detriment or damage of said vessel or any part thereof. * * * " (Tr., 17).

The underwriters inserted in their policies the following warranties, among others, of special note (Tr., 17):

(a) For that part of the voyage on which this tug was lost that she should be "*in tow of the steamer 'Freeport Sulphur No. 1.'*"

(b) "*Vessel and towing arrangements subject to approval of surveyor of United States Salvage Association, James F. Taylor.*"

Some of the policies stipulate in lieu of the above paragraph (b) that:

> "*Vessel and towing arrangements subject to Lloyd's or other approved surveyor.*"

Accordingly, both Mr. James F. Taylor, the above named surveyor, and Mr. Verne Dyer, who is a Lloyd's surveyor, and surveyor to the New York Board of Underwriters, were required to survey the "Wash Gray" and her towing arrangements.

Each and very one of the defendants herein admit that they are members of both the above mentioned United States Salvage Association and the New York Board of Underwriters.

Accordingly, these underwriters' expert marine surveyors visited the "Wash Gray," and after having surveyed and examined her, made various recommendations (Tr., 74 and 177), which, in their opinion, would fit her for the proposed voyage; and after these recommendations had been carried out to their complete satisfaction, said James F. Taylor reported, among other things, as follows (Tr., 75-76):

> "The undersigned visited the vessel after all recommendations were carried out and found vessel on this 10th day of May, 1922, in seaworthy condition, and fit to be towed to the port of Galveston, Texas."

Mr. Verne Dyer reported, among other things (Tr., 176-177):

> "In my opinion this vessel is in first class condition to be towed to any Texas port during the next sixty days."

Both Mr. James F. Taylor (Tr., 73) and Mr. Verne Dyer (Tr., 74) thereafter separately reported in identical terms as follows:

> "Wash Gray ready for sailing, vessel seaworthy and approved, also towing arrangements approved, carries steam and crew, date of sailing furnished later."

These reports were signed, respectively, by each one of said surveyors.

Mr. Verne Dyer was called as a witness in this case and was examined and cross-examined under a commission. After testifying to his twenty-two years service as a marine surveyor, etc., he made answer to the sixteenth direct interrogatory (Tr., 72), as follows:

> "In my opinion the 'Wash Gray' left Tampico in first class seaworthy condition to be towed to Galveston, Texas, under ordinary conditions of weather and sea. Every requirement as usually demanded by insurance representatives having been fulfilled."

The survey reports from these expert marine surveyors, and the testimony of Mr. Dyer above quoted, all stand without any contradiction or criticism of any kind whatsoever from any witness produced by either side.

Mr. John D. Grant, a surveyor for the London Salvage Association and for various underwriter associations, and leading underwriters (Tr., 111, 112), with twenty years' experience (Tr., 112), made an examination of this vessel just prior to her departure from Galveston, Texas, when she was sent to Tampico, Mexico, about two years prior to her loss on the return trip. He affords many particulars of the wood construction of this vessel, sizes of her timbers, plankings, etc., affording, also, much information re-

specting her machinery, etc. (Tr., 169-170, etc.) and, on Tr., 171, testifying to her double towing bitts, says:

> "The forward towing bitts are 12" x 12" with a table connecting them together, these bitts pass through the deck and are securely fastended in the bottom of the tug."

And, at Tr., 133, says:

> "She was a good strongly constructed little boat."

Several other witnesses of wide experience in construction and repair work, notably Captain C. A. Barbour (Tr., 145), and Jessie Barbour (Tr., 79, 80), have testified to the excellent condition of that vessel.

So, also, the machinery and equipment of this vessel was specially inspected at Tampico by the Mexican Government Inspector for Merchant Marine. His report thereof is dated June 26, 1922, a few days before her departure (Tr., 76, 77, 78). It shows in detail the equipment of the "Wash Gray" and the complete excellent condition thereof. The vessel was originally built in Pennsylvania and some years thereafter underwent such extensive repairs she was practically rebuilt just before she was sent to Tampico, about two years before she was lost, coming back, as stated herein.

Even Captain C. G. Haslund, master of the steamship "Freeport Sulphur No. 1," the vessel which had the "Wash Gray" in tow when lost, who was called as

a witness by the underwriters, testified, under cross-examination, as follows:

> Q. So far as you know, Captain, did the owners of the "Wash Gray" in any way or to any extent, neglect to do anything that they should have done for the safeguarding and proper towing of the "Wash Gray?"
>
> A. So far as I know, they did not.

All of the foregoing testimony stands absolutely uncontradicted by a single witness.

Joyce on the Law of Insurance, Vol. 4, Sec. 2159, p. 3687, 2nd Ed. (1917), with citation of authorities, in speaking of inland-water vessels taken out to sea, says:

> " * * * If a vessel is built for river service and not for open sea navigation and is insured for a voyage to a place where it is intended to be used and said voyage necessitates navigating the open sea for at least a part thereof, a recovery for the loss of the vessel shortly after putting to sea, cannot be defeated on the ground of an implied warranty of seaworthiness for the sea voyage where assurer, before assuming the risk is put in possession of all information concerning the construction and character of the vessel, the plans and specifications thereof and has knowledge through its engineer of the extent of the hazard and accordingly exacts double the ordinary premium charged for sea

going vessels, so that the nature of the service for which she was intended is fully known to both parties."

See, also, *Arnould on Law of Marine Insurance* (set out in petition *supra*).

It is not only a most noteworthy fact that the underwriters have not attempted to attack their own surveyors' reports on the seaworthiness of the "Wash Gray" (with the cumulative evidence on the same subject unqualifiedly in support thereof), through any witness or document, but it is equally true that although they specifically plead three separate purely technical affirmative defenses, set out as such, they do not plead unseaworthiness, which, as the Court thoroughly understands, must be pleaded and proven as a matter of defense, if the underwriters should seek to rely thereon, because a presumption of law obtains that the vessel, on the commencement of her voyage, is seaworthy.

The overwhelming amount of evidence above referred to, secured from the highest type of expert marine surveyors, some of them making the examination for this particular voyage, stands without contradiction from any witness whomsoever.

In that leading English case, *Davidson v. Burnand, C. P., Vol. IV, p. 117, at p. 120*, the Court said:

"So far as regards the question of unseaworthiness, that is disposed of by the evidence of competent persons that the ship was seaworthy, and it seems, therefore, after

that, impossible for us to say that in our judgment the vessel was unseaworthy."

And, in *Batchelder v. Insurance Co., 30 Fed., 459, 460*, referring to surveyors' reports, the Court said:

"As we have seen the surveyors report her in good condition. If this report was unattacked it would be conclusive."

Notwithstanding the foregoing uncontradicted probative evidence and, presumably, the settled law, the United States Circuit Court of Appeals for the Fifth Circuit by reason of setting up, in effect, a uniform standard for its application of the terms "perils of the sea" and "seaworthy," without taking into consideration the size, type and construction of the vessel, has held in the face of the underwriters' own surveyors' reports, and the construction which is placed upon such reports by American and foreign tribunals, that because the condition of the sea and weather was such to operate merely as a moderate sea to a three thousand-ton iron steamship, but was extraordinary, overwhelming and irresitible to a little wooden inland-water vessel, insured as such at an extraordinary premium, that, therefore, she was unseaworthy, and lost by reason thereof, and not by a peril of the sea.

But see American and English decision, *supra*, on conclusiveness of marine surveyors' reports not disputed in any way by any witness.

Then, too, it has been held, as follows:

"If the evidence in the case established the fact of seaworthiness, there is, where a disaster occurs without any discernable

cause a presumption of fact that the loss was occasioned by some of the perils insured against."

Moores v. Louisville Underwriters, 14 Fed. Rep., 226 (C. C.).

See, also, *Pennsylvania R. R. Co. v. Mannheim Insurance Co., 56 Fed. Rep., 304.*

In *Arnould on Marine Insurance, 10 Ed., p. 936, Sec. 726*, in speaking of methods for proving seaworthiness of a vessel, says:

"Section 726: With regard to the means of proving that the ship was unseaworthy, or the reverse, the most satisfactory evidence is that of the persons who were employed to survey and examine the vessel; after their evidence has been given, however, experienced shipwrights, who never saw the ship, may be called to say whether, upon the facts sworn to, she was in their opinion seaworthy or not."

EACH RESPONDENT SETS UP IDENTICAL TECHNICAL AFFIRMATIVE DEFENSES, THREE IN NUMBER, ALL OF WHICH WERE CONSIDERED BY THE DISTRICT COURT, NONE OF WHICH WERE CONSIDERED BY THE CIRCUIT COURT OF APPEALS.

Although the said purely technical defenses are ignored by the Circuit Court of Appeals, because of its own opinion in the premises of what constitutes "perils of the sea" and seaworthiness, we will very briefly

take up each one of said defenses in their order; although a consideration thereof is really not necessary for the purpose of determining what petitioner submits to be grave errors in the opinion of the Circuit Court of Appeals herein on most important points in the law of marine insurance.

First Affirmative Defense: In their "first affirmative defense" (Tr., 30-32) respondents urge that petitioner entered into a written contract with the owners of the steamship "Freeport Sulphur No. 1," the vessel which the underwriters stipulated should do the towing, wherein and whereby it was agreed that the steam tug "Wash Gray" should be towed by the steamship "Freeport Sulphur No. 1," and that the "steamship 'Freeport Sulphur No. 1' is not responsible in any way for any loss or damage to the 'Wash Gray,' " and that information of this condition in the contract was concealed until after the loss of the tug. That it was material to the risk and respondents would not have issued the policy had they known of this fact.

By reference to the transcript, page 17, it will be noted that the underwriters conditioned the insurance upon the following warranty:

> "Warranted confined to the use and navigation of the covering trip from Tampico to Freeport, Texas, *in tow of steamer 'Freeport Sulphur No. 1'* * * * ."

This warranty, as the Court appreciates, simply means that if any vessel other than the steamship "Freeport Sulphur No. 1"—the one designated in the warranty—was employed to do the towing, such action

would breach the warranty and vitiate the insurance. Necessarily, then, the underwriters well knew that by inserting that warranty in their policy not only would a contract exist for that towage, but distinctly knew that the owner of the "Wash Gray" was bound to contract with the owner of the "Freeport Sulphur No. 1" for this service. It necessarily follows, further, we believe, that it is reasonable to presume that each party had a right to believe that this contract would be made as was usual and customary for the owners of that steamship to agree to, for such towage service; and it is shown, without contradiction, that just such a contract was made. The stipulation complained of standing as one which has always been inserted by the owners of said steamship in every such contract made by them in their years of service (Mims, Tr., 198, 199).

Mr. Mims still further testifies (Tr., 199) that if the owners of the tug "Wash Gray" had even agreed to pay a higher towage price to eliminate from the contract the stipulation that the service would be at the risk of the tow, the Company, without regard to what amount might be offered, would not have entered into such a contract, or any contract different from the one made in this case. Such was the contract made necessary to secure the service of that vessel which was required in the policy to do the towing. This stands without contradiction.

Hence, the trial Judge held (Tr., 612) that:

> " * * * They (the underwriters) did not inquire for a view of the contract. It is not clear that their brokers and agents did not know of the very terms of the towage con-

> tract, since it was stipulated as a condition precedent to the underwriting that the specific steamship 'Freeport Sulphur No. 1' and another later to be selected and approved by them for their agents, was to do the towing."

This Honorable Supreme Court held in a case involving land fire insurance, while discussing this general principle, in *Clark, et al., v. Manufacturers Insurance Co., 8 How., 236, 249, 12 L. Ed., 1061-1066*, that:

> "The relation of the parties seems entirely changed, if the insurer asks no information and the insured makes no representations. * * * We think that the governing test on it must be this: It must be presumed that the insurer has in person or by agent in such a case obtained all the information desired as to the premises insured, or ventures to take the risk without it and that the insured, being asked nothing has a right to presume that nothing on the risk is desired from him."

In England, in *Freeland v. Glover (7 East., 457)*, a letter was disclosed to the underwriters that mentioned an earlier letter which was not asked for. Held that the underwriters by their failure to ask for this document, the existence of which they knew, operated as a waiver of its contents.

In *Asfar v. Blundell, 2 B. R., 202*, Matthew, J., says:

> "It is a well settled principle of insurance law that underwriters are not entitled

> to be told what they waive all inquiry about. In this particular case they were told that there was a charter, and if they had wanted to learn the contents of that charter, they had only to inquire."

In another leading English case, *Clark v. Boehm, 3 Burr. (1910)*, Lloyd Mansfield says:

> "The insured need not mention what the underwriter ought to know, what he takes upon himself the knowledge of or what he waives being informed of."

Again, in *Inman Steamship Company v. Bischouff, L. R. 7 App. Cas., 670*, it appears the underwriters were afforded knowledge that the "City of Paris" was under a contract of charter party. As the underwriters did not ask for particulars of that contract the Court held that the particulars were waived.

Since the owners of the "Wash Gray" were bound, under the very terms of respondent's policy of insurance, to have the steamship "Freeport Sulphur No. 1" do the towing, the underwriters were not merely put upon inquiry, but actually knew of the creation of such a contract, as one made necessary between the owners of said vessel by the very terms of their own policy (Tr., 17). And as this contract was made not only in the usual terms and conditions, but on the only terms and conditions it was possible to make, because in the only terms and conditions the owners of that steamship had ever made in their many years of such service. If the underwriters were not familiar with the terms and conditions of the contract made neces-

sary by the terms and conditions of their policy they could readily have advised themselves thereof, even before requiring the service of that steamship to do the towing.

So, therefore, if the underwriters are estopped from setting up the above referred "first affirmative defense," and are to be held to at least constructive knowledge of the contents thereof; or, as having waived such knowledge; then, their affirmative defenses two and three must fall; because the last two defenses are predicated solely upon their contention in their "first affirmative defense."

Second and Third Defenses: Respondents urge in their second and third defenses that by reason of the terms of the contract for towage, as in their "first affirmative defense" complained of, although that contract in precisely those terms was made necessary by the fact that the policies of insurance specifically require that the steamship "Freeport Sulphur No. 1" should do the towing on that part of the voyage on which she was lost—and it was the only kind of contract her owners would make at any price—that according to their construction of said contract the steamship "Freeport Sulphur No. 1" stands released from actionable negligence, and that if this be true, with the policy of insurance providing that where a third person is released from a liability which would otherwise be subrogated to the assurer upon payment of the claim, that the underwriter becomes released *pro tanto.* So, therefore, the underwriters urge that the tug "Wash Gray" was towed at an excessive speed, respecting which not a single witness has testified

thereto, and further dealing in conjecture and inference, urge that such speed amounted to approximately a concurrent efficient cause of the sinking of the said steam tug. That, therefore, as they did not know anything about the terms of this contract until a copy thereof was contained in the proofs of loss, they should be released from liability because the "Freeport Sulphur No. 1" is released under the terms and conditions of that contract required by the underwriters' policies in designating that steamship to do the towing. This alleged liability, too, is based upon conjecture only. The third affirmative defense is to the same effect, and, further, pleads that the tug "Wash Gray" was towed too fast "in spite of the winds, waves and weather conditions which were encountered on said voyage." That Captain Clyde Barbour, the president of the company owning the "Wash Gray," knew that she would be towed at a speed too fast.

Taking these two affirmative defenses in their order, petitioner submits that the testimony of all the seafaring men examined in this case, who discussed the question of speed, not a single one produced either by petitioner or respondent have criticized in any way to any extent the action of the master of the "Freeport Sulphur No. 1" towing at the rate he did under the existing circumstances. Other testimony shows that under all the circumstances the steamship "Freeport Sulphur No. 1" both as to towing and everything else was free from blame. Captain Haslund, master of the steamship "Freeport Sulphur No. 1," has twenty-four years continuous service at sea, four years of which as a master in towing service. He was, of course, appointed by the owners of the ship.

Various witnesses testify that much must be left to the discretion of the master, assuming he is competent. The record shows without contradiction that the "Wash Gray" could travel on inland water at a rate of twelve miles an hour without any danger of injury to her (Tr., 358).

The undisputed testimony shows, contrary to respondents averments, that the owners of the towing steamship did not say anything to Captain Barbour, president of the petitioning company, or to any body else represented or interested in the ownership of the "Wash Gray," concerning the speed at which the tug would be towed (Tr., 201) nor was any direction given to the master of that steamship by the owners of that steamship respecting what time should be made in handling this tug; on the contrary, it is shown without contradiction in the testimony of Mr. Mims, representing the owners of the steamship, that this question of speed was

> "Left at the discretion of the master of the towing vessel, and I assume the master of the tug, too, if they were going too fast—of course, it depended a good deal on the weather. It was left to the discretion of the master of the towing vessel, and the master of the vessel that was being towed." (Tr., 201.)

That testimony stands absolutely without any contradiction whatsoever. It was shown, too, by the testimony of several witnesses, without contradiction, that it is necessary in towing such a vessel to, at all times, keep the towing line taut, because of the con-

stant danger that such a vessel, in tow, may run off to one side or the other into the trough of the waves, and be tripped or turned over, with probable loss of life of every man on board.

It was even admitted in the original brief (p. 56) filed by respondents on their appeal, as follows:

> "Libelant has taken elaborate testimony to prove that good seamanship requires that a continual strain be kept on the towing hawser to keep it from becoming slack and that a sufficient speed is necessary to keep the towed vessel from sheering into the trough of the waves. This is obviously true and we should have thought it more obvious that testimony need not have been taken to prove it."

And, in respect to the reasonableness of the towing done under all the conditions present, we have the following from two witnesses produced by respondent:

Mr. C. C. Marshall, deck officer, and Captain C. C. Haslund, Master, of the steamship "Freeport Sulphur No. 1," were both called as witnesses for respondents and testify as follows:

Mr. C. C. Marshall, deck officer of the S/S "Freeport Sulphur No. 1" (Tr., 439), on cross-examination, says:

> Q. So far as you know, within your personal knowledge, did the officers or crew of the "Freeport Sulphur No. 1," in any way, at any time, do anything to jeopardize the safety of the "Wash Gray?"
>
> A. No, sir.

Q. So far as you know, during the time that the "Freeport Sulphur No. 1" was towing the "Wash Gray," did they do everything that is usual and customary and that should be done with respect to the safety of the tug, that they could?

A. Yes, sir.

Capt. C. C. Haslund, master of the said steamship, testified, at page 432, as follows:

Q. And so far as you and your vessel are concerned, and as a practical seaman, did you, or any of your men neglect to observe, or take proper care or caution in the handling of the "Wash Gray?"

A. No.

The foregoing testimony stands without contradiction and comes from respondents' own witnesses.

In the *Czarina, 112 Fed. Rep., p. 541, at page 545,* the Court says:

"Upon the question whether a prudent master, surrounded by the same circumstances, would have pursued the same course, the evidence of experienced navigators would have been competent. The Frederick E. Ives (D. C.), 25 Fed., 447. No witness of that character testified that the master of the Czarina, in leaving the raft did what a prudent and careful navigator would not have done under like conditions."

Nevertheless, respondents did not produce a single experienced navigator, or, for that matter, any one to testify whether the speed at which that vessel was towed evidenced good seamanship, within the discretion allowed to the master in charge of the operation.

And in the above case *(112 Fed. Rep., p. 541)*, at page 544, the Court says:

> "But the Czarina cannot be held liable for the subsequent loss of a portion of the raft, before it was finally recovered, 'because the master in an emergency did not do precisely what, after the event, others may think would have been best.' The Hercules, 19 C. C. A., 496, 73 Fed., 255. This principle of law was very clearly expressed by Chief Justice Waite in the case of The W. E. Gladwish, 17 Blatchf., 77-83, Fed. Cas. No. 17,355:
>
> " 'The tug undertook to bring to this work such prudence and such nautical skill as was ordinarily required in such navigation. More was not contracted for, and more was not expected. When the ice was reached it became necessary to decide whether to lie by or to go on. This involved the exercise of judgment as to what ought to be done under the circumstances. A mere mistake is not enough to charge the tugs with any loss which followed. To make them liable, the error must be one which a careful and prudent navigator, surrounded by like circumstances, would not have made.'

> "The following cases are also to the effect that a mere error of judgment upon the part of the master of a tug will not render it liable for the loss of the tow, unless the error was so gross that it would not have been made by a master of ordinary prudence and judgment. The Battler, 19 C. C. A., 6, 72 Fed., 537; Sonsmith v. The J. P. Donaldson (C. C.), 21 Fed., 671; The James P. Donaldson (D. C.), 19 Fed., 264; The Packer (C. C.), 28 Fed., 156; The Wilhelm (D. C.), 47 Fed., 89; Mohawk, 7 Ben., 139, Fed Cas. No. 9653; The Frederick E. Ives (D. C.), 25 Fed., 447; The Masher, 4 Biss., 274, Fed. Cas. No. 9874."

In *The Wilhelm, 47 Fed., 89, at p. 93*, the Court says:

> "Again, I say, the mere happening of the disaster does not condemn his judgment for some other disaster might have befallen him if he had taken the other course, and been a surer condemnation of him."

In other words, the master of the steamship "Freeport Sulphur No. 1" might have towed the tug in these choppy seas which were striking the tug from every direction, threatening to send it in the trough of the sea—maybe, he could have gotten along alright towing at a little slower speed, but not a witness says it would have been prudent; and maybe, also, a slower speed might have permitted the choppy seas to send that tug into the trough of the seas when her tow line

would then have operated to trip her or turn her over, causing not merely the loss of the tug, but so, also, the life of every man on board. The master of the ship did not gamble with human life as the stakes.

In the *W. E. Gladwish, 17 Blatchf., 77 Fed. Cas. No. 17,355*, by Circuit Justice Waite, it was held:

> " * * * The mere fact of sinking the cargo is not enough. Actual fault, contributing to the loss, must be proven. * * * "

The officers and crew of the "Wash Gray" were outside men, that is, seafaring men (Barbour, Tr., 160). L. Carbajal was her master, and had seventeen years experience at sea (Tr., 49). A. Romero, chief engineer and machinist, nineteen years experience as marine engineer (Tr., 64).

These men were on the "Wash Gray" during all the three and a half hours she was rolling and pitching heavily, her seams opening, all her pumps working; and none of them have said that tug should have been towed in that sea in any other way than she was towed. They made no complaint, evidently satisfied it was the best to be done. When the head of the tug buried and seemed as though it would not come up, then they signalled the steamship "Freeport Sulphur No. 1," and cut the tow line.

The preliminary protest of the "Wash Gray" at Freeport, Texas, made on the day when landed there; the affidavit taken by the underwriters' representa-

tive when the master of the "Wash Gray" was landed from the steamship "Freeport Sulphur No. 1" at Freeport, Texas, he immediately entered protest, which appears on the supplemental sheets pasted in at Tr., page 58. The officers and crew of the "Wash Gray," at the request of Mr. James F. Taylor, as agent of the insurance companies, made a statement signed by the full crew, which appears at pp. 54-57, inclusive; affidavit before United States Consul at Tampico, signed by the master of the "Wash Gray" (Tr., 60-61).

The above extract of the log of the tug "Wash Gray" appears at Tr., 61.

Even if the underwriters would be permitted to insist upon a contract for a certain towage service by a particular steamship, as a condition precedent to the insurance attaching, and then, although such contract be made in the only terms and conditions the services of that steamship have ever been secured, and then set up that those terms and conditions operated to release the said steamship from liability if guilty of actionable negligence, and, under the terms of the policy such a release operated to release the underwriter, petitioners submit, aside from all questions of good faith such contention is open to, the underwriters would be bound at least to prove the actual commission by said steamship of such actionable negligence; and failing therein that alleged release would be inoperative, their being no loss under any circumstance chargeable against the ship, hence none released.

Then, too, the execution of that contract did not of itself operate to vitiate the insurance *eo instanti* with the execution thereof, but the provision of the policy is intended to release the underwriter, *pro tanto*, as any third party may be released of liability without the expressed or implied consent of the underwriter.

However, that the third affirmative defense, predicated upon the first affirmative defense, is unavailing in the absence of testimony of a single witness in support thereof, and cannot be established by an effort to impute negligence herein, on a theory that the "Wash Gray" was towed too fast, we respectfully submit what was said by the District Judge in his opinion herein (Tr., 614), as follows:

> "* * * The speed of the 'Wash Gray' under its own power was shown to have been from ten to twelve miles per hour. She was towed at an average of about nine miles per hour, following nicely and handling well, unstrained and unhurt for the greater part, or three-fourths, of the voyage. The respondents, with no evidence to sustain them, argue upon a theory that this speed should have been reduced after the sea became rough. The evidence satisfied me that the master and officers of the towing ship exercised their best judgment; that the steady speed of about nine miles became necessary to keep the tow lines taut, so as to avoid having the towed vessel sheer to one side or the other, get into the trough of a sea, be thus tripped and

turned over. Opposed to this there is no evidence to show that this desirable result could have been achieved at lesser speed; or that the master of the towing vessel erred in his judgment in maintaining that speed. There is certainly nothing to justify the unwarranted assumption by respondent that the vessel was pulled apart by excessive speed in towing, upon which their theory is predicated, as hereinbefore recited."

Respectfully submitted,

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Attorneys for Petitioner.

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CHARLES ELMORE CROPL
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 510-520, Inc.

THE COMPANIA DE NAVEGACION, INTERIOR, S. A., Petitioner,

versus

FIREMAN'S FUND INSURANCE COMPANY, (of San Francisco, California), Respondent,

—— and ——

THE TEN FOLLOWING CONSOLIDATED CASES TRIED ON THE ONE RECORD:

511—Globe & Rutgers Fire Ins. Co. of New York;
512—Northwestern F. & M. Ins. Co. of Minneapolis, Minn.;
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519—Franklin Fire Insurance of Philadelphia;
520—Phoenix Insurance Co. of Hartford, Conn.,
Also Respondents.

REPLY TO RESPONDENTS.

JOHN D., M. A., & EDWIN H. GRACE,
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JOHN D. GRACE,
Of Counsel.

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Also Respondents.

REPLY TO RESPONDENTS.

We respectfully submit that the learned counsel for respondents are in error in their assumption that the petitioners' argument confuses the waiver of the warranty of seaworthiness with what an insurer must show to establish a loss by "perils of the sea."

On the strength of the authorities set out in the "FOREWORD" at page 1-4, of our original brief, we urge that for a determination of what is a loss by a "peril of the sea" it is necessary to consider the size, type and construction of the vessel concerned; and in this regard a loss by a "peril of the sea" is understood to be, as held in the Third Circuit, a loss *where the peril is extraordinary to a boat of her particular size, type and construction.* In other words, that the term "peril of the sea" is a relative term, so that what may not be a peril of the sea for a large iron ocean going vessel may easily be a very grave peril of the sea with respect to a small wooden vessel.

It is an outstanding fact that the underwriters, themselves, after having had their own survey of petitioners' vessel charged a premium amounting to *from more than six times to more than eight times the ordinary premium charged on ordinary sea going vessels;* and when it is considered that the rate of premium is based upon what they may determine as the degree of peril to which a vessel may be subjected it is manifest that the term peril of the sea is relative with respect to the different size, type and construction of vessels, notwithstanding, the Fifth Circuit herein to the contrary.

Having set out in the "FOREWORD" of petitioners' original brief (pp. 1-4) leading cases and quotations from writers of acknowledged authority on the law of insurance, we pass the foregoing point to refer to the effect which the waves and wind, as perils of the sea, had upon this particular little wooden vessel in bringing about her destruction.

It may be mentioned here that both lower Courts found that the "Wash Gray" was lost by reason of the action of the wind and waves upon her. It is shown, even in the opinion of the Circuit Courts of Appeals that the waves and wind were such as to cause this vessel to roll and pitch continuously, during a period of over three hours. It is shown, too, this caused such straining of the vessel even her double towing bitts were loosened, bitts which had been surveyed and after certain work was done thereon under the surveyors' recommendations, stood approved by both underwriters' surveyors. These bitts were not pulled out as stated in respondents' brief, but to some extent under the constant strain worked loose at about 10 o'clock at night, and a Spanish windlass was then rigged to hold them in place, which it did, and within an hour and a half later the master of the tug caused the tow line to be cut because the tug was then in a helpless sinking condition, with water pouring in through seams opened by her rolling, pitching and pounding, which badly strained her.

The testimony of Captain C. G. Haslund, Master of the steamship "Freeport Sulphur No. 1," a witness

called by the underwriters who, having testified that the log of the steamship "Freeport Sulphur No. 1" indicated a moderate swell, stated that this log was kept for the steamship with respect to conditions as they related to the steamship itself, and "not with regard to this little tug behind" (Tr., 421).

In his affidavit (Tr., 53), Captain Haslund, the above named witness, further says:

> "However, what is a light and moderate swell aboard a three thousand ton ship could be considered as heavy weather aboard an eighty foot tugboat, being towed at the rate of nine miles per hour."

And on page 427, this expert mariner, a witness produced by the underwriters, says that where a wooden vessel rolls or pitches in the sea, it has a straining effect on the ship—and he makes no distinction as to size—"and of course, the seams will open up."

It is shown without dispute that the height of the waves were approximately five feet high, and the wind velocity of approximately twenty-five miles per hour, plus the approximate speed of the tug, (nine miles an hour), gives approximately thirty-four miles an hour, making an effective wind pressure against the tug of approximately thirty-four miles an hour, a wind pressure which the United States Government scale (Beaufort) rates as a moderate gale.

It is shown by the record that the mean draft of the "Wash Gray" was approximately only seven and

a half (7½) feet in waves running five feet high, which would equal two-thirds of her draft; so we submit it would appear as a rather astounding contention to say that if a wooden vessel of thirty feet draft encountered monstrous waves twenty feet high, which would be only two-thirds of her draft, and was wrecked thereby, that this loss should not be considered as occasioned by a peril of the sea.

Therefore, the line of petitioners' argument is directed not only to show that the vessel was in a thoroughly seaworthy condition—inspected and approved as such by the underwriters' own surveyors—but that her loss is readily accounted for as from a peril of the sea, unless the Circuit Court of Appeals for the Fifth Circuit is correct in holding herein as a proposition of law "that the phrase 'perils of the sea' does not vary in meaning according to the size and type of the vessel." But, as that proposition, laid down by the Circuit Court of Appeals for the Fifth Circuit, is in conflict with the Third and Second Circuits, and with leading English cases and leading English and American works of high authority on the law of insurance, we believe that this Honorable Court will lay down such a rule as will prevent injustice in respect to an interpretation of the term of "perils of the sea," a condition of the sea which may be extraordinary, with respect to the relative size, type and construction of vessels, just as the underwriters themselves levy a relative measure of compensation or premium for the risk they undertake, broadly differ-

ent upon vessels of different types, size and construction.

Second. At page 16 of respondents' brief, last paragraph, in discussing the towage contract they say it was conceded by petitioner that certain facts were not disclosed; whereas there never has been and petitioners have never at any time conceded that there was any concealment of any material fact.

Indeed the very contract of towage referred to *was actually imposed upon the petitioner by the respondents*, as is shown below.

The policies of insurance sued on expressly show,

> "Warranted confined to the use and navigation of the covering trip from Tampico to Mexico, Texas, *in tow of steamer 'Freeport Sulphur No. 1.'*" (Tr., 17).

Manifestly, unless petitioner did contract for the service of the said steamship, as required by the policy, the insurance would never have attached.

As a matter of fact, we have pointed out in our original brief (pp. 33-38) that the petitioners contracted for the services of the steamship "Freeport Sulphur No. 1," to do the towing between the ports, as required by the policy of insurance, and that the contract so made was in the very terms and conditions in which all the contracts for such services have ever been made by the owners of the steamship "Freeport

Sulphur No. 1," petitioner still further showing in above mentioned pages that no other or better terms could be secured, no matter what compensation might be offered.

So, therefore, we respectfully submit it is a rather astounding proposition for the underwriters to urge that they are relieved from liability because of the terms and conditions of the very contract which those same underwriters compelled petitioner to enter into.

We quote in the pages above referred to of the original brief a decision by this Honorable Court and leading English cases showing that where the underwriters knew a contract was in existence and did not ask for a view thereof that they are considered as having knowledge of its contents or at least having waived information with respect thereto. How much stronger are they justly bound by the terms of a contract they have compelled the insured to make.

Third. At pages 40 and 41 in our original brief, we have pointed out, with quotation of testimony, that there was no agreement or understanding that the vessel would be towed at any particular rate of speed, but that this was left to the discretion of the master of each vessel, with not a particle of evidence to show this speed was excessive, and further that it was necessary to tow the vessel at a speed sufficient to at all times keep the tow line taut to prevent the vessel from sheering to one side or the other, in which event she

probably would be tripped or overturned with the loss of every life on board, with quotation at page 41 of petitioner's brief showing that respondents well understand this to be true.

Believing that we have fully presented the material conflicts between the Fifth Circuit and other circuits as well as with English and American law writers citing leading English and American cases, we do not believe it necessary to make any further presentation in this cause.

Respectfully submitted,

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CHARLES ELMORE

IN THE

Supreme Court of the United States,

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—against—

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(of San Francisco, California),
Respondent,

—and—

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Also Respondents.

BRIEF ON BEHALF OF RESPONDENTS.

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SUBJECT INDEX.

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There are marked differences between *Klein* v. *Globe & Rutgers Fire Insurance Co.*, 2 Fed. (2) 137, and this case. The language quoted by the petitioner is an *obiter dictum* from the opinion of the District Judge in that case..... 1

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The weather conditions described by the men on the *Freeport Sulphur No. 1*, and as found by the Circuit Court of Appeals being normal, they did not constitute a peril of the sea..... 8

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The Circuit Court of Appeals having decided that the petitioner had failed to make out its case found it unnecessary to discuss the three affirmative defenses set up by the underwriters in their answer. These defenses were:

(1) The petitioner failed to disclose to the underwriters that the towing company was not to be liable for loss or damage to the *Wash Gray*, a fact material to the risk, and thereby rendered the policy void. *Sun Mutual Insurance Company* v. *Ocean Insurance Company*, 107 U. S. 485..... 15

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(2) The petitioner violated a provision of the contract of insurance when it stipulated in the towing contract that the towing company should not be liable for loss or damage to the *Wash Gray*, the vessel insured..... 15

(3) The petitioner failed to disclose to the underwriters the fact that the *Wash Gray* was to be towed at the rate of nine miles an hour, a fact material to the risk..... 16

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Also Respondents.

BRIEF ON BEHALF OF RESPONDENTS.

ANSWER TO FOREWORD OF PETITIONER'S BRIEF.

There Are Marked Differences Between Klein v. Globe & Rutgers Fire Insurance Co., 2 Fed. (2) 137, and this case. The Language Quoted by the Petitioner Is an Obiter Dictum From the Opinion of the District Judge in That Case.

In the foreword to the brief filed by the petitioner,

reference is made to the case of *Klein* v. *Globe & Rutgers Fire Insurance Co.*, 2 Fed. (2) 137. Apparently the petitioner is relying upon a supposed conflict between the decisions in this case and that in the *Klein* case as the basis for its application to this Court for a writ of certiorari. An examination of the *Klein* case, however, shows marked differences in that case from the case at bar. We quote the following from the opinion of the District Judge in the *Klein* case (at p. 140):

> "The *Tornado* (the vessel insured), according to the weight of the testimony, left New Orleans without any water in its hold. It arrived at Pilot Town without having taken any considerable amount, but several hours after arrival was noticed to be listing, and examination disclosed that it was leaking badly, and later sank, despite all proper exertions of the crew in charge. On the trip from New Orleans to Pilot Town, up-river winds and swells were encountered. The wind was not so strong as to suggest the existence of a tempest, but the swells created were such as to give the boat 'a good shaking up'. The watchmen on board have testified that at one stage of the journey from New Orleans to Pilot Town, for a period of about half an hour, the *Tornado* underwent considerable strain. 'She seem to hit something', 'she kept bucking' (jumping up and down), were expressions used to describe the action of the boat. One watchman, Reid, has testified that while this 'bucking' was going on he took his flashlight and went over the boat to determine the cause, and while doing so saw a log come out on the port side under the vessel's guard. It will be remembered that the boat was joined to the barge *Ashland* on that side, and

the space between the hulls was a foot—perhaps a few inches more.

Counsel for the respondent has forcibly attacked this testimony of the watchmen as incredible, and has pointed out that neither of them mentioned a log in affidavits made by them shortly after the misfortune of the *Tornado*, nor did either of them report it to the captain in charge of the tow upon arrival at Pilot Town. In an affidavit made September 14, 1921, Libellant's Exhibit 63, Brandhorst said: 'The wind and swells were so heavy coming down that I believe we struck something.' In an affidavit made on October 25, 1921, Reid said: 'We may have hit something coming down, as the winds and swells were heavy. This is the best explanation that I am able to give.'

The absence of specific mention of the log incident in the early affidavits is undoubtedly a matter for notice, and were there no supporting evidence, we should perhaps be justified in ignoring this part of the testimony of the watchmen by reason of it. *There is such supporting evidence, however, and that evidence in itself very strongly tends to show that the Tornado met her fate from a peril of the river rather than from inherent unseaworthiness. In his deposition, J. G. Sanford, the diver, called by the respondent, who examined the wreck on September 13, 1921, said: 'Well, I found her in good condition; the only thing—I examined her from stem to stern, and the only thing I found was two or three pieces of sheeting, from the stern to right about her midships, as far as I could judge, two or three feet, that was pulled four or five feet away by a log or somtehing striking her; but the inside of the boat didn't seem to be damaged at all.'"* (Italics ours.)

The Circuit Court of Appeals in the *Klein* case said (at p. 144):

> "The respondent has not satisfied us that the learned District Judge did not reach the right conclusion that the boat sank by reason of a peril of the sea, against which she was insured, nor has it satisfied us that the damages awarded were excessive."

It thus appears that in the *Klein* case, striking a log was the peril of the sea which the Court found was the cause of her loss. This, of course, was a fortuitous event. Hence, whatever the Court said in that case was intended to be considered in the light of that proved fact. There was no evidence in the present case of any fortuitous occurrence. We submit, therefore, that the decision in the *Klein* case cannot be treated as a decision contrary to that of the Circuit Court of Appeals in the present case.

Moreover, there is another sharp distinction between the *Klein* case and this case, *viz.:* In the present case the policy did not insure against latent defects, whereas there was an insurance against latent defects in the *Klein* case. That policy contained the following clause:

> "This insurance also specially to cover (subject to the free of average warranty) loss of or damage to hull or machinery * * * through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship," etc.
>
> *Klein* v. *Globe & Rutgers Fire Ins. Co.*, 2 Fed. (2) 137, at p. 139.

And in the course of the District Judge's opinion, it is said, at page 140:

> "But, on the other hand, the policy will cover, not only those losses that result from injuries caused by extraordinary action of the perils insured against which become immediately known, but such also as result from latent injuries."

We shall allude later in this brief to the fact that a latent defect in the towing bitts may have been the cause of the loss of the *Wash Gray;* if so, there is no liability under the policies. But in the *Klein* case there would have been liability because there the policies covered loss from latent defect.

The two cases are markedly dissimilar, and we respectfully submit that an *obiter dictum* from the opinion of the District Court Judge is all that the petitioner can show to sustain any alleged conflict of rulings between the Fifth and Third Circuits. Obviously, the District Judge in the *Klein* case used the language quoted in petitioner's brief with the facts of that case before him, and it should not be supposed that he intended such language to apply in a case where the facts are not the same.

The Petitioner's Argument Confuses a Waiver of the Warranty of Seaworthiness With What an Insured Must Show to Establish a Loss by Peril of the Sea.

The policy of insurance on which the suit is brought, insured the petitioner against

> "perils of the harbors, bays, sounds, seas, rivers

> and other waters as above named, and fires that shall come to the hurt, detriment or damage of said vessel or any part thereof. Excepting always all claims arising from or caused by the following, or other legally excluded causes, *viz.*: From all damage that may be done by the vessel hereby insured to any other vessel or property. From incompetency of the Master or insufficiency of the crew, or from the want of ordinary care and skill in loading and stowing the cargo of said vessel. From rottenness, inherent defects, and other unseaworthiness. From war, invasion, riots or civil commotion, theft, barratry or robbery. From the bursting or explosion of boilers, collapsing of flues, or any injury, derangement or breakage of machinery, unless caused by stress of weather, stranding, collision, or burning," etc. (R. 17, 18).

It should be noted that the policy contains no coverage against latent defects, as is often found in marine policies in a clause commonly known as the "Inchmaree Clause".

The Circuit Court of Appeals found as a fact that the policies insured the petitioner's steam tug *Wash Gray* against loss by perils of the sea. These policies expressly excepted claims arising from unseaworthiness (R. 646). The Court then proceeded to point out that the suit was defended on the grounds, among others, that the loss, ~~which was admitted~~, was not caused by a peril of the sea, but either by unseaworthiness or by negligent towing (R. 646). The Court found that it was immaterial whether the loss of the tug was attributable to negligent towing or to a choppy sea, because in any event the loss was not caused by a peril of the sea, which was the risk insured against by the policy.

Noting the fallacy in the protracted arguments advanced by the petitioner before it, the Circuit Court of Appeals pointed out that a warranty of seaworthiness might be waived so that the underwriters could not declare the policy void because of unseaworthiness, but at the same time, the waiving of the warranty of seaworthiness did not make the underwriters liable for unseaworthiness, nor did it relieve the petitioner of its obligation to show that the loss had occurred as the result of an insured peril. The Circuit Court of Appeals said:

> "Assuming the correctness of the trial court's finding of facts in favor of appellee, the *Wash Gray* was lost because it was not staunch enough to withstand the ordinary action of the wind and waves; in short, because it was unseaworthy. As the policy of insurance expressly excepted the risk of unseaworthiness, there can be no recovery on that ground. Appellant made its own examination and survey, and thereby waived the implied warranty of seaworthiness. It could not thereafter contend that the policy was rendered void by reason of a breach of the warranty; but it still was entitled to defend a suit as to the cause of loss, and the burden still remained on appellee to prove that the loss was caused by a peril of the sea. *New Orleans, etc., Ry. Co.* v. *Union Marine Insurance Co.*, 286 F. 32" (R. 649).

The entire argument of the petitioner in this Court is based on failure to note this distinction. Here, as the Circuit Court of Appeals clearly stated, there was no defense that the policy was void on the ground of a breach of warranty of seaworthiness, but that the defense was that there had been no loss under the policy, no

peril being shown. In other words, it was, as the Circuit Court of Appeals said,

> "immaterial whether the loss of the appellee's tug was attributable to negligent towing or to the choppy sea" (R. 648),

for no peril had been shown, the weather being such as was ordinarily to be anticipated on the voyage.

The fact found by the Court that no peril had been shown, clearly appears from the testimony of Captain Haslund (R. 413), who testified that he had been towing between Tampico and Freeport for a period of about seven years and that the weather encountered was not unusual.

The Weather Conditions Described by the Men on the Freeport Sulphur No. 1, and as Found by the Circuit Court of Appeals Being Normal, They Did Not Constitute a Peril of the Sea.

The undisputed evidence in the case is that the wind and waves encountered were not unusual and were such as are to be expected on a voyage across the Gulf. Both courts below have found the wind did not exceed 25 miles an hour and the waves did not run higher than from 4 to 5 feet from crest to trough. That no one should expect the Gulf of Mexico to remain as calm as a mill pond is a truism, and, we submit, the Circuit Court of Appeals was clearly right in its finding that the condition of the wind and weather was such as would ordinarily be expected on any voyage from Tampico to Freeport, Texas. If the light wind and small swells which the petitioner sought to magnify to

a peril of the sea could have been exaggerated into a peril of the sea, the men who wrote up the protest and the logs certainly would have done so; for as Mr. Justice Washington said in the *Virid* (Fed. Case No. 16978), more than a hundred years ago:

> "In protests the seas are always mountains high and the wind never less than a hurricane."

It has been held by this Court that the phrase "perils of the sea" as contained in a policy of insurance, has the same meaning as that phrase used in a bill of lading.

The G. R. Booth, 171 U. S. 450.

In *The Rosalia*, 264 Fed. 285, at page 288, the Circuit Court of Appeals for the Second Circuit, in defining the meaning of that phrase in a bill of lading, said:

> "The decisions of this court already contain two accepted definitions of the phrase 'Perils of the Sea', *The Warren Adams*, 74 Fed. 415; *The Guilia*, 218 Fed. 746, 134 C. C. A. 422. They need not be repeated further than to insist that the peril which forms a good exception in a bill of lading means something so catastrophic as to triumph over those safeguards by which skillful and vigilant seamen usually bring ship and cargo to port in safety."

In *The Gulnare*, 42 Fed. 861, the Court said (p. 862):

> "The protest states that she 'encountered heavy seas and rolled heavily'. This is not a peril which is insured against, but is only an ordinary peril which any strong vessel encounters everywhere."

In *Morse* v. *St. Paul Fire & Marine Ins. Co.*, 124 Fed. 451-53, the Court said:

> "The weather was stormy, but the evidence is clear that it was not of an extraordinary character for the season; that is, November, 1901, in which month the voyage was commenced."

In *Higgie* v. *American Lloyds*, 14 Fed. 143, the master testified (at p. 146):

> "After we left Las Palmas she encountered heavy weather. There is a tradewind down there which makes a very heavy sea; they shook her up pretty lively; she rolled very heavy; first one way under and then the other way under.
>
> We had to reef sails and shorten things down. Between midnight and morning found she was making more water than usual; at daylight was making water very badly—so much so it was thought best to make a port of safety and find out whether we could do anything to stop the leaks."

The Court, in discussing this testimony, said (at p. 147):

> "There was no extraordinary peril encountered; the vessel rolled heavily upon the waves produced by the tradewinds. There was no gale, no storm such as would have imperiled a staunch, strong vessel."

In the *Rappahannock*, 184 Fed. 291, the Court held that a gale in which the wind reached a velocity of sixty miles an hour was not a peril of the sea. The Court said:

> "The evidence showed that the *Rappahannock* on this trip encountered three severe gales, on

> Lakes Superior, Huron and Erie, respectively. The captain and mate estimated the wind velocity at sixty miles an hour. They encountered heavy seas, sometimes quartering; but in the fall of the year such gales and seas are not infrequently encountered on the Lakes as the captain himself admitted. None of the witnesses claim or pretend that the gales were extraordinarily terrific or that there were exceedingly heavy pitching and plunging of the vessel on the swells of the sea * * *.
>
> The conclusion is that the *Rappahannock* encountered conditions of wind and sea which were not unusual at that season of the year."

The standard definition of the term "perils of the sea" which was formulated by Mr. Justice Story nearly one hundred years ago in *The Reeside,* Fed. Case No. 11657, and which has since been constantly adhered to, is as follows:

> "The phrase 'danger of the seas', whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element; or whether understood in its more extended sense, as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence."

In *British & Foreign Insurance Co.* v. *Gaunt,* 1921, 2 A. C. 41, 57, Lord Sumner says:

> "It (insurance) covers a risk, not a certainty."

Or, as Arnould expresses it (Vol. II, p. 1001, 11th Ed.):

> "The damage caused by springing a leak is not a charge upon the underwriters, unless it is directly traceable to some fortuitous occurrence, as where the leak can be proved to have been caused by a heavy sea striking the vessel or by her being driven on a rock, etc.; where the leak arises from the unseaworthy state of the ship when she sailed, or from wear and tear or natural decay, and is only a consequence of that ordinary amount of straining to which she would unavoidably be exposed in the general and average course of the voyage insured, the underwriter is not liable." (Arnould on Marine Insurance (11th Ed.) §777.)

Or as Lord Herschell put it in *The Xantho*, 12 App. Cas. 503, at page 509:

> "There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen."

An Admission of Seaworthiness Does Not Render an Underwriter Liable in the Absence of Proof of a Sea Peril.

The Privy Council considered the whole matter in the case of *Grant, Smith & Co.* v. *Seattle Construction* Co., 1920 App. Cas. 162, at page 171. The head-note of the case is as follows:

> "The appellants hired from the respondents

for two years a dry-dock to be used afloat in construction work on caissons at Victoria, British Columbia. By the hiring agreement the appellants admitted that the dry-dock was seaworthy and fit for the work contemplated, and agreed to keep it insured for the benefit of the respondents for $75,000 against marine risks and to redeliver it in equally good condition save for wear and tear. While the dry-dock was being used in harbour for the contemplated work it capsized and was totally lost; the accident was due to its inherent unfitness for the work, and not to any condition of the wind or sea. The appellants had failed to insure the dry-dock as agreed; its value was only $34,500.

HELD, that the loss was not due to a marine risk, and that consequently the respondents were not entitled to recover as damages $75,000 but only $34,500.

Judgment of the Court of Appeal affirmed."

During the course of the judgment, Lord Buckmaster said:

"In the case of *E. D. Sassoon & Co.* v. *Western Assurance Co.*, a store of opium was lost in a hulk moored in a river by the percolation of water through a leak caused by the rotten condition of the boat. The decay was so covered by copper sheathing that, although the vessel was properly inspected, it was not, and it could not, be detected. It was held by this Board that the loss was not within the phrase 'perils of the sea and all other perils', and Lord Mersey, in delivering the opinion of the Board, states:

'There was no weather, nor any other fortuitous circumstance, contributing to the incur-

> sion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea.'
>
> Their Lordships can see no difference between the circumstances of this case and the principle there enunciated. It is just as though a vessel, unfit to carry the cargo with which she was loaded, through her own inherent weakness, and without accident or peril of any kind, sank in still water. In such a case recovery under the ordinary policy of insurance would be impossible. An insurance against 'the perils of the sea or other perils' is not a guarantee that a ship will float, and in the same way in the present case had such a policy been effected it would not have covered a loss inevitable in the circumstances due to the unfitness of the structure, and entirely dissociated from any peril by wind or water."

In the case of *E. D. Sassoon & Co.* v. *Western Assurance Co.*, cited by Lord Buckmaster, there was no warranty of seaworthiness. (*Sassoon & Co.* v. *Western Assurance Co.*, 1912 App. Cas. 561, at p. 562.)

See also:

> *New Orleans, Texas & Mexico Railway Co.* v. *Union Marine Insurance Co.*, 286 Fed. 32, 35.

Petitioner virtually says there was a peril of the sea because the boat was lost and because the underwriters admitted she was seaworthy when she sailed. If we should admit this bold proposition, yet petitioner would

fail here, because, as what petitioner is in effect attempting to do is to prove a loss by sea peril by eliminating the possibility of all other causes of loss, and as it has failed to show that the bitts did not give way from latent defect, it has failed to eliminate that cause.

Thus here, the weather conditions being shown to have been ordinary, the loss of the vessel being due to the fact that the bitts pulled out, if any presumption is to be indulged in, such presumption would be that there was some insufficiency in the bitts not discoverable by inspection. See *Pederson* v. *John D. Spreckles & Bros. Co.*, 87 Fed. 938, page 945, where it is said:

> "The presumption, therefore, if any is to be indulged in, would be that the breast chock was defective because it broke."

The Circuit Court of Appeals Having Decided That the Petitioner Had Failed to Make Out Its Case Found It Unnecessary to Discuss the Three Affirmative Defenses Set Up by the Underwriters in Their Answer. These Defenses Were:

(1) *The petitioner failed to disclose to the underwriters that the towing company was not to be liable for loss or damage to the "Wash Gray", a fact material to the risk and thereby rendered the policy void. Sun Mutual Insurance Company* v. *Ocean Insurance Company*, 107 U. S. 485.

(2) *The petitioner violated a provision of the contract of insurance when it stipulated in the towing contract that the towing company should not be liable for loss or damage to the "Wash Gray", the vessel insured.*

(3) *The petitioner failed to disclose to the underwriters the fact that the "Wash Gray" was to be towed at the rate of nine miles an hour, a fact material to the risk.*

From pages 33 to 48 of its brief, the petitioner discusses the affirmative defenses set up by the respondent in its answer. In an effort to brush these defenses aside, the petitioner alludes to them as "technical defenses". It is sufficient to say, however, that a large part of the numerous briefs filed by the petitioner in the Circuit Court of Appeals is devoted to the discussion of the merits of these so-called "technical defenses". The first defense set up the failure of the assured to disclose to the insurance company a fact which was material to the risk, *viz.*: that before the issuance of the policy the petitioner had entered into a contract in writing with the owners of the *Freeport Sulphur No. 1*, the towing vessel, whereby it was agreed that the *Wash Gray* should be towed by the *Freeport Sulphur No. 1*, but that

> "Steamship *Freeport Sulphur No. 1* is not responsible in any way for loss or damage to the *Wash Gray*" (R. 31).

It was conceded that this fact was not disclosed. All of the underwriters testified that it was material to the risk, as obviously it was. Hence, under the decision of this Court in *Sun Mutual Insurance Co.* v. *Ocean Insurance Company*, 107 U. S. 485, the policy was void. In the *Sun Mutual* case, this Court said (p. 510):

> "In respect to the duty of disclosing all material facts, the case of reinsurance does not differ from that of an original insurance. The obliga-

> tion in both cases is one *uberrimae fidei.* The duty of communication, indeed, is independent of the intention, and is violated by the fact of concealment even where there is no design to deceive."

The second defense set up the following clause of the policy:

> "Any agreement, contract or act, past or future, positive or implied by the insured whereby any right of recovery of the insured against any vessel, person or corporation is released, decreased, transferred or lost which would, on acceptance of abandonment or payment of loss by this company, belong to this company but for such agreement, contract or act, shall render this policy null and void as to the amount of any such loss or damage, but the company's right to retain or recover the full premium shall not be affected" (R. 32, 33).

The answer alleged that the towing contract constituted a breach of this provision of the policy and alleged that by reason of the said contract, the underwriter had been deprived of subrogation, in the event of payment of the loss, because of the provisions of the towing contract and that the policy had thereby been rendered void. Much evidence was taken on this subject which it is unnecessary to review now. It will suffice to say that if the case is to be reviewed, such evidence will be considered fully.

The third affirmative defense set up the fact that the petitioner knew that the *Wash Gray* would be towed at a speed from 9 to 10 knots per hour at the time the insurance was issued, but failed to disclose this fact to the underwriters.

The petitioner states that these affirmative defenses were ignored by the Court of Appeals. The fact is, however, that the Court of Appeals did not find it necessary to discuss these affirmative defenses as it was satisfied that the petitioner had failed to make out its case. The Court said:

> "It is immaterial whether the loss of appellee's tug was attributable to negligent towing or to the choppy sea" (R. 648).

The Petitioner Sought to Excuse Its Failure to Disclose the Fact That the Towing Was to Be Done at the Risk of the Petitioner by Proof of an Alleged Usage or Custom.

(1) *The petitioner ignored a provision in the policies that no custom or usage should affect, control or void any condition of the policy unless endorsed thereon in writing.*

(2) *The petitioner failed to establish that the alleged usage or custom was so general as to be universally known to all engaged in the trade. Tate* v. *Hyslop,* 15 Q. B. D. 368.

In an effort to meet the affirmative defense set up by the underwriters with respect to the failure to disclose, the petitioner endeavored to establish a custom or usage in the Gulf for towing to be done under contracts such as the petitioner entered into with the owners of the *Freeport Sulphur No. 1.* We submit that the petitioner not only failed to establish such a custom, but

that the policy itself precluded the parties from relying upon a custom. The policy provides:

> "no custom, usage or waiver of any kind shall affect, control or void any condition of this Policy, unless endorsed hereon in writing" (R. 22).

It was never contended in either of the lower courts that the waiver suggested was ever endorsed on the policy or reduced to writing, nor was it contended that the underwriters orally waived the production of the towing contract. The proof is conclusive that the underwriters knew nothing of the existence of the towage contract. Although the name of the towing steamer was inserted in the policy by the assured, not by the underwriters, nothing was disclosed to the underwriters regarding the conditions upon which the towage contract was to be performed. Mr. Young, the broker representing the petitioner who placed the insurance, testified that he made no disclosure to the underwriters in regard to the terms of the towage contract at any time (R. 462). The various representatives of the insurance company testified that if they had known that the contract contained a clause exempting the towing company from negligence, they would not have issued the policy (R. 483, 529, 530). The first that the underwriters knew of the existence of the contract was on June 20, 1922, after the loss, when a copy of it was sent them by William H. Young & Company, brokers for the petitioner (R. 273, 274).

The law is well settled that to dispense with the necessity for the communication of a material fact the

usage must be universally known to all engaged in the trade.

> "But to dispense with communication of anything done according to usage, such usage must be general and universally known to all engaged in the trade." Citing decision of Lord Eldon in *Tennant* v. *Henderson*, 1 Dow. 324, 3 English Reprint, 716.
>
> Arnould on Marine Insurance, Sec. 610.

And Arnould, in Section 609, says (p. 805):

> "The assured cannot, however, excuse his omission to communicate a material fact on the ground that the fact had previously come to the knowledge of the underwriter, unless at the time when the contract was made the fact was present to the underwriter's mind." Citing *Bates* v. *Hewitt*, L. R. 2 Q. B. 595.

Arnould also says (Sec. 609, p. 806):

> "It has also been held in the Supreme Court of the United States that the assured cannot excuse his omission to disclose material facts by showing that they were actually known to the underwriter unless the knowledge of the latter was as full and particular as his own." Citing *Sun Mutual Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S. 485.

In *Tate & Sons* v. *Hyslop*, 15 Q. B. D. 368, the Court of Appeal in England considered a case almost identical with that now before us. Usage or custom was there relied on, but the Court held that such a usage or custom as was proved did not excuse the assured from disclosing

the terms of an agreement because it was not so general that every merchant contracted with respect to it. Here the petitioner's own witness, Walsh, testified that it was his understanding that towing on the Gulf was to be done under a contract whereby the towing company was to be responsible for the towing company's own fault (R. 393). There is a mass of other evidence which must be discussed if the case is to be reviewed, and we have merely alluded to the issues involved in the case so that the Court may have before it upon consideration of this application an outline of the entire case. A review of the case here will involve a reconsideration not only of the question on which the Circuit Court of Appeals decided the case in favor of the respondent, but also of the affirmative defenses, which, in view of its decision that Court found it unnecessary to discuss.

The prayer of the petitioner should be denied.

Respectfully submitted,

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